United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

34

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,113

UNITED STATES OF AMERICA,
Appellee

v.

SIDNEY HARRISON MOORE,
Appellant

No. 24,114

UNITED STATES OF AMERICA,
Appellee

v.

REUBEN WILLIAM MOORE, JR.
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

STATEMENT OF THE ISSUE

Whether a search warrant which is unconstitutionally broad in its description of the place to be searched is validated by reason of the fact that the affidavit upon which issuance of the warrant was based describes the place to be searched with particularity.

REFERENCE TO RULINGS

The Motions Judge (J. Beard) of the District of Columbia Court of General Sessions made his oral ruling suppressing the evidence at page 31 of the record (App. 19); the orders to that effect are found at pages 44 and 45 of the record (App. 20-21).

The District of Columbia Court of Appeals' opinion and judgment reversing Judge Beard are found at pages 54 and 55 of the record (App. 22-25). The decision is reported as *United States v. Moore*, 263 A.2d 652 (D.C. App. 1970). 1970).

STATEMENT OF THE CASE

On June 11, 1969, officers of the Metropolitan Police Department searched the defendants' premises under the claimed authority of a search warrant issued the previous day in the District of Columbia Court of General Sessions (J. Beard). The defendants' premises were located at 3417 M Street, Northwest, Apartment 7, on the upper floor of a two-story structure having two upstairs living units extending the entire depth of the building from front to rear.[1] The warrant pursuant to which the search was made commanded the executing officers to search the "Entire Premises, 2nd Floor Front, 3417 M Street, Northwest," a designation which encompassed another living unit, apartment 8, as well as apartment 7 (App. 6-9, 27). Evidence intended to be used against the defendants was seized in the search of their premises (apartment 7) and they were subsequently charged with unlawful possession of marijuana in violation of 33 D.C. Code § 402 (1967).

[1]The evidence showed that there was one first-floor front door leading off the sidewalk marked "3417". This door opened directly to a straight flight of about 15 stairs at the top of which was a small landing. Apartment 7's door was on the right and Apartment 8's door was on the left of the landing. Both apartments fronted with bay windows on M Street (App. 6-9, 16-21).

The defendants moved to suppress the seized evidence on the ground that, *inter alia*, the warrant was void, and the ensuing search therefore illegal, because the warrant's description of the place to be searched lacked the particularity required by the Fourth Amendment. The motion was heard and granted on this ground on July 25, 1969, by Judge Beard of the District of Columbia Court of General Sessions, without any judgment as to the other objections raised (App. 18-19). The Government appealed and the District of Columbia Court of Appeals reversed on the ground that the lack of particularity in the warrant could be cured by a more specific description of the place to be searched in the supporting affidavit (App. 22-24).

Application for a warrant to search the defendants' premises was made on June 10, 1969, allegedly on the basis of a nighttime identification of potted plants in the defendants' window as marijuana.[2] The officers' affidavit reveals that they were fully aware of the multi-unit character of the second floor of 3417 M Street. The affidavit describes the defendants' premises as being a front rather than rear apartment. It specifically names the premises as apartment number 7, so that the officers knew the structure had more than one living unit (App. 26). The downstairs space of 3417 M Street and the other structures along the 3400 block of M Street are given over to commercial rather than residential use in that they have a "storefront" appearance (App. 17-21). The officers also obviously knew the names of the occupants of the apartment in question, since "Reuben (sic) W. Moore and Sidney Harrison" are specifically named in the affidavit. Nevertheless, the officers acquiesced in the issue of a warrant that neither described the defendants' apartment relative to the landing

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[2]There is no suggestion in the affidavit that the defendants had ever trafficked in narcotics or that their interest in marijuana extended beyond the homegrown variety allegedly identified in their living room window.

and stairway, nor mentioned either the apartment number or the names of the occupants.

SUMMARY OF ARGUMENT

The Fourth Amendment to the Constitution and D.C. Code, § 33-414(b) (1967) require that a search warrant *particularly describe* the place to be searched. The United States conceded that the building to be searched in this case was a multi-occupancy dwelling (Brief to District of Columbia Court of Appeals, p. 2). The court below also conceded this fact in its opinion where it noted that the "Entire Premises' 2nd Floor Front, 3417 M Street, N.W." covered two apartments (App. 27). It is well settled that in the case of a multiple occupancy dwelling, a warrant issued on probable cause for searching only one apartment must not describe the entire building. *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955); *United States v. Barkouskas*, 38 F.2d 837 (D. Pa. 1930); *Kenney v. United States*, 81 U.S. App. D.C. 259, 157 F.2d 442 (1946).

The warrant in this case describes the entire building at 3417 M Street, N.W. The motions court held that the warrant was invalid for failure to describe particularly the one apartment for which probable cause was claimed in the affidavit. The District of Columbia Court of Appeals reversed on the ground that despite the warrant's lack of particularity in the place to be searched, it was nevertheless valid because the affidavit contained a particularized description of the defendants' apartment which was to be searched.

The District of Columbia Court of Appeals should be reversed. Its decision is contrary to this Court's decision in *United States v. Kaye*, U.S. App. No. 22,543 (June 30, 1970), which was rendered only four months after this case was decided, and which held that the description in a search warrant rather than the description in the accompanying affidavit defines the area to be searched. Further, the court below by its decision has established a dangerous precedent

in that it sanctions a search by police based on an unconstitutionally broad warrant provided the affidavit upon which issuance of the search warrant was based contains the requisite particularity.

ARGUMENT

A Warrant Commanding the Search of Two Separate and Distinct Apartments, Where There is no Attempted Showing of Probable Cause for Search-More Than one of the two Apartments, is Violative of the Constitutional Requirement of Particularity and is Therefore Void, and Such a Warrant Cannot be Cured by an Affidavit Allegedly Establishing Probable Cause for the Search of one Apartment.

The only issue on this appeal is whether the search warrant which lacks the required particularity in the place to be searched is validated by the presence of such particularity in the affidavit upon which issuance of the warrant was based. There is no dispute that the warrant's description of the place to be searched, "Entire Premises, 2nd Floor Front, 3417 M Street, N.W." embraced an apartment other thar the defendants', (See Appellee's Brief to District of Columbia Court of Appeals, p. 2 and page 2 of the Slip Opinion of the District of Columbia Court of Appeals) (App. 23). Nor is there any dispute that a search warrant, to satisfy the particularity requirement when multiple unit dwellings are involved, must describe the particular unit which is the target of search and not include other units or apartments. The government conceded this point at page 5 of its brief to the court below in these words: "a warrant issued on probable cause for searching one apartment must describe more than the entire building or else it will fail for lack of description."

Despite these concessions, the District of Columbia Court of Appeals upheld the warrant on the ground that the affidavit on which the warrant's issuance was based contained

a more particular description of the place to be searched, namely, only defendants' apartment 7. The position of the court below is contrary to this court's decision in *United States v. Kaye*, U.S. App. D.C. No. 22,543 (June 30, 1970). In *Kaye*, the search warrant authorized a search of 3618 14th Street, N.W. which, the evidence showed, was a first floor with basement used for business purposes (radio and television retail–repair outlet). The evidence also showed that above the business premises was the defendant's apartment where he lived. The police searched the second floor apartment even though access to the apartment was through another door and that the two units were separate and distinct. In an attempt to justify the search of the apartment, the government argued that the affidavit, upon which issuance of the warrant was based, contained a description of 3618 14th Street, N.W. as "a *two story* brick building used for the sale and service of televisions, stereos and records . . ." In other words, the government sought to justify the search of a place unauthorized by the warrant by reference to the broader description of the place to be searched found in the supporting affidavit. This court rejected the argument in terms directly applicable to this case (Slip Opinion, pp. 5-6):

> ". . . we think it plain that Judge Jones was correct and that Judge Pratt's ruling was the result of misunderstanding and confusion between the warrant and the supporting affidavit. As Judge Jones rightly held, the premises to be searched were those described in the warrant as 3618 14th Street, N.W., not 'a two-story brick building.'
>
> The store and apartment were not an integrated unit but were two separate and distinct parts of the building. There was no access to the apartment from the store and no apparent connection between the two. The arrangement is typical of that so frequently existing in urban communities, where living quarters are found over stores. When a store and an apartment are thus arranged a warrant authoriz-

> ing search of the store—as this warrant did—can hardly be stretched to justify an intrusion into the apartment, regardless of language in the supporting affidavit which might be construed more broadly. See *Keiningham v. United States*, 109 U.S. App. D.C. 272, 287 F.2d 126 (1960); Cf. *Irwin v. United States*, 67 App. D.C. 41, 89 F.2d 678 (1937). *It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched.*" (Emphasis added).

The District of Columbia Court of Appeals' decision in this case is in direct conflict with *Kaye*. Contrary to *Kaye*, it permits the description of the supporting affidavit to define the area to be searched. As this court held in *Kaye*, "It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched." (Slip Opinion, p. 6). The warrant in this case authorized the search of two living units, apartments 7 and 8. Such overbreadth, according to *Kaye*, cannot be cured by reliance on the supporting affidavit. It should be clear that if an excessively broad *search* cannot be cured by reference to the warrant's supporting affidavit, then an overly broad *search warrant* cannot be remedied by the more particular description of the affidavit. To hold otherwise would be a repudiation of *Kaye* in that on the one hand the search warrant would be upheld but the search in reliance thereon would be invalidated.

The position of the court below cannot withstand examination as a purely logical matter. The Constitution provides that warrants, and not merely searches, be based on probable cause, and this language has been faithfully adhered to in cases involving searches of private dwelling places. *Agnello v. United States*, 269 U.S. 20, 32-33 (1925); Cf. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). There is no occasion to rely on the affidavit to narrow the command of the warrant unless the terms of the warrant itself exceed that area for which probable cause exists. Only in the most sophistical sense is such a warrant then based on probable cause.

The court below stated that the constitutional test of sufficient particularity is that "the officer serving the warrant must be able, with reasonable effort, to ascertain and identify the place intended". *Steele v. United States*, 267 U.S. 498, 503 (1925). It is submitted, however, that such identification must be made on the basis of the warrant alone and that the terms of the affidavit should not be consulted in determining whether this test has been met. *Steele v. United States*, supra, cited by the court below, does not involve delimitation of a general warrant by reference to the narrower scope of the supporting affidavit. As the Court observed in *Steele v. United States*, supra at 500, the "search warrant . . . followed the affidavit in the description of the place . . . to be searched . . ."

Nor do the other cases cited by the court below provide support for its decision to uphold the warrant. The court below indicated in its opinion that the insufficient particularity on the face of the warrant would be remedied by the requisite particularity in the affidavit "if attached to the warrant and incorporated therein by reference" (App. 23). All that this record shows is a "form" warrant parenthetically stating "affidavit attached herewith" (App. 27). There was no evidence that it was in fact attached to the warrant, much less incorporated by reference. Thus both tests for validating the warrant relied upon by the court below and in the two cases cited by the court, *Frey v. State*, 3 Md. App. 38, 237 A.2d 774 (1968) and *Ellison v. State*, 186 Tenn. 581, 212 S.W.2d 387 (1948), are not satisfied by the evidence in this case.

But, as noted above, the reasoning of the court below must fail on grounds more fundamental that factual distinctions between this case and the questionable authority provided by *Frey* and *Ellison*. The area authorized to be searched is, of course, the area for which probable cause has been established. *United States v. Hinton*, 219 F.2d 324, 325 (7th Cir. 1955); *United States v. Poppitt*, 227 F. Supp. 73, 76 (D. Del. 1954). The supporting affidavit *could* keep the executing officer within this precise area

only if such officer (a) either is the affiant or has carefully consulted the affidavit, and (b) is guided not by the literal command of the warrant but by the affidavit's more complex and detailed language. Neither of these is a reliable assumption; the breakdown of either would invariably result in an unjustified and unlawful intrusion upon the privacy of innocent persons.

The better rule, accordingly, is that a search warrant is valid only if the description therein is "sufficient to enable (the) officer executing the search warrant to locate the premises to be searched without aid of any other information save that contained in (the) warrant." *Wallace v. State*, 89 Okla. Crim. 365, 208 P.2d 190 (1949). The wisdome of such a rule is manifest: as piously as one might hope that an executing officer will observe limitations contained in the affidavit, it is far more likely that he will heed the command of the warrant "(giving) him authority to search the house of an innocent person without any attempt to show probable cause, which the Constitution of the United States (Amend. 4) intended to prevent." *United States v. Barkouskas*, 38 F.2d 837, 838 (M.D. Pa. 1930); *Accord: State v. Ratushny*, 82 N.J. Super. (App. Div.) 499, 198 A.2d 131, 135 (1964). Indeed, this court in *United States v. Kaye*, supra, has now held that the officer *must* follow the description in the warrant: "It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched." (Slip Opinion, p. 6).

In *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955), an affidavit stated that certain named persons were trafficking in heroin on the premises of 6423 Champlain Avenue, a three-story house comprised of four apartment units. The warrant commanded the search of the entire house, and the defendants moved to suppress for lack of probable cause and sufficient particularity. The court first stated that "(t)he command to search can never include more than is covered by the showing of probable cause to search." 219 F.2d at 325. The warrant was therefore held void because it commanded a search of the entire premises

even though there had been no showing of probable cause for searching each of the individual units or for treating the entire premises as a single unit. Even more significantly, the court declined to look to the terms of the supporting affidavit to cure the warrant's lack of particularity. The affidavit in *Hinton* gave the address of the building and named the persons whose apartments were to be searched. The warrant merely named the premises. Had the United States Court of Appeals for the Seventh Circuit adopted the view of the District of Columbia Court of Appeals that the more particularized terms of the affidavit could be read into the warrant's statement of the place to be searched, the warrant would have been valid under *Kenney v. United States*, 81 U.S. App. D.C. 259, 157 F.2d 442 (1946), and *Shore v. United States*, 60 App. D.C. 137, 49 F.2d 519, cert. denied, 283 U.S. 865 (1931). In those cases, both of which were approved in *Hinton*, the particularity requirement was held satisfied by the inclusion *in the warrant* of the address of the multi-occupancy building and names of the persons whose apartments were to be searched. The naming of such persons in the affidavit had no such limiting effect, however, since the warrant "expressly commanded the search of the entire building." 219 F.2d at 326.

The inability of an affidavit to function as a substitute for compliance with the Constitution's warrant requirements was demonstrated in a different but analogous context in *United States v. Haywood*, 284 F. Supp. 245 (E.D. La. 1968). There a warrant commanded the search of defendant's premises. Although the supporting affidavit admittedly provided probable cause for searching defendant's person as well as his premises, evidence seized from the defendant's person was suppressed. Like the issuance of a warrant, the constitutional requirement of particularity is not to be diluted by having recourse to the supporting affidavit.

The whole point of having a magistrate pass upon the question of probable cause is to require the executing officer to rely on the magistrate's judgment rather than on that of the affiant. *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). Thus the basic policy underlying the requirement of a warrant is to discourage the executing officer from reverting to the terms of the affidavit, yet this is the very practice that the District of Columbia Court of Appeals would encourage. It would also remove all incentive for insisting on particularity in warrants, thereby enhancing the risk to the public of illegal searches occasioned by an executing officer's honest attempt to carry out a warrant's explicit directive.

Precisely because overly broad warrants—regardless of the terms of the supporting affidavits—pose such a grave threat to the privacy and liberty of innocent citizens, the Fourth Amendment contains a simple prophylactic rule: search warrants may not validly be issued except on probable cause and with a particular description of the place to be searched. Dutiful application of this rule to the instant case compels the conclusion that the search warrant was void and that the evidence seized was properly suppressed by the District of Columbia Court of General Sessions (J. Beard).

CONCLUSION

For the above reasons, the decision of District of Columbia Court of Appeals should be reversed.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,113

SIDNEY H. MOORE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 24,114

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the District of Columbia Court of Appeals

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Did the search warrant, with its supporting affidavit, describe the place to be searched with sufficient particularity to satisfy the requirements of the Fourth Amendment?

2. Do appellants have standing to complain of that the search warrant was unduly broad, when the alleged overbreadth did not infringe upon their rights in any way?

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* This case has not previously been before this Court.

United States Court of Appeals

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UNITED STATES OF AMERICA, APPELLEE

Appeals from the District of Columbia Court of Appeals

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a decision of the District of Columbia Court of Appeals reversing an order of the District of Columbia Court of General Sessions, which had

granted a motion to suppress evidence filed by appellants in the latter court. The judgment of the District of Columbia Court of Appeals was rendered on March 31, 1970. This Court granted leave to appeal by order entered July 8, 1970.

On June 10, 1969, Plainclothesman Walter Milam and Officer Henry Daly of the Narcotics Section, Metropolitan Police, made application for a Court of General Sessions search warrant for the premises at 3417 M Street, N.W. They based their request on the observation of marijuana plants in the front window of the second floor apartment of the two-story building at that address. Their investigation revealed that this apartment, No. 7, was leased to appellants. All of this information was contained in the affidavit in support of their application (App. 26). Accordingly, the officers submitted their application for a search warrant for

> "Premises 3417 M Street, Northwest, 2nd Floor Front, Washington, D.C. Premises occupied by John Doe, Reuben W. Moore, and Jane Doe, Sidney Harrison."

The place to be searched was further identified twice in the body of the affidavit as apartment No. 7. On the same date, Judge Edward A. Beard authorized a search warrant for

> "Entire Premises, 2nd Floor Front, 3417 M Street, N.W." (App. 27.)

On June 11, 1969, Officers Daly and Milam entered apartment No. 7 and searched it pursuant to the warrant. They found marijuana. The police officers entered only apartment No. 7 as described in the affidavit, and no other areas in the building were searched or entered. Appellants were subsequently charged with unlawful possession of marijuana in violation of 33 D.C. Code § 402 (App. 2-3).

On July 25, 1969, a motion to suppress evidence was heard before Judge Beard sitting in Motions Court. Appellants took the position at that hearing that any evi-

dence secured pursuant to this search warrant should be suppressed on the ground that the warrant was defective because it was too broad.[1]

Appellant Reuben W. Moore, Jr., testified at the hearing that he lived with his wife, the co-appellant, at 3417½ M Street, N.W. on June 11, 1969 (App. 4, 6; Tr. 5, 7). He testified that their apartment was on the second floor of this building, that it was reached by a flight of stairs, that their apartment was located to the immediate right of the second floor landing and another apartment was to the immediate left of the landing (App. 6, 8; Tr. 7-9). Appellants' apartment was No. 7, and the other was No. 8 (App. 16; Tr. 20).

The apartments involved in this case are in a typical two-story row house in Georgetown, with a business store on the first floor and apartments on the second. The row houses in this block have the appearance of being separated by stairways which lead to the second floor. The addresses of the buildings are over the entrances to these stairways. Officer Henry Daly testified that the number "3417" and appellants' names were on the stairway door leading to the second floor apartments. Apartment No. 7 is to the right of the stairway marked "3417," and apartment No. 8 is to the left of the stairway. Because of the appearance that these stairways separate the buildings, there is considerable confusion in the record as to whether apartments 7 and 8 are both in the building described as "3417" or whether they are in separate buildings[2] (App. 11-17; Tr. 15-25).

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[1] On this point, appellants contended in their written motion only that the warrant was too broad because it allegedly authorized the officers to search for items other than the marijuana plants in the window. They argued that the officers should have been limited to those items mentioned in the affidavit, thus admitting, in effect, that the affidavit can qualify the warrant and is incorporated therein. Appellants also asserted that there was no probable cause for the warrant and that the warrant was unlawfully executed. However, these arguments were never reached by the court.

[2] In attempting to resolve this question, the court made several ambiguous statements:

[Footnote continued on page 4]

[Continued]

[T]he warrant is issued to search the second floor front apartment at 3417 M Street. And under the testimony when you go in 3417 M Street and go to the second floor there are two apartments on that floor. No. 7 and No. 8, and both of those apartments are on the front. And the warrant covers both parts or a part of both of the apartments. It doesn't cover No. 7, it doesn't cover the right apartment or the east apartment. It covers the front. And that includes two apartments.

* * * *

Oh, it [Apartment No. 8] does face the front. He simply says that it faces the front over top of what he would tend to call 3419 rather than 3417. He says it is over in front of a different building. He might be right about that. But even if he is right about that, the point is when you get to the second floor of 3417, the area that is identified as 3417 down below on the door, there are two apartments. And each apartment has a front window. The one on the right does, and the one on the left does. He may call the left one 3419, but nobody who lives there does.

* * * *

The point is it [the warrant] is not specific because the door to 3417 services two buildings upstairs or two bay windows which are on each side of the hall, and one does appear to be in a separate building. But when you start talking about the store, the store underneath, that is serviced by the doorway at 3419; but the doorway 3417 services the apartment that is over the store.

* * * *

If I were the policeman and I had a warrant to search the front part of the second floor at 3417, I would certainly figure I had a warrant and an authorization from a Judge to search both of those bay window areas because they are both on the front at 3417 on the second floor.

* * * *

I have told you as far as I am concerned this warrant appears to me to authorize a search of two apartments at 3417. And there are two apartments under that number at that door. There are two apartments, one on the right and one on the left.

Now, the officer says—he has got some merit for saying—if you are going to break it up into lots and squares, he might say the left apartment at 3417 is on a different lot and square number. And it might be. It looks like this thing is built sort of like a checkerboard or a rabbit warren of some kind with the apartments floating back and forth over the stores or maybe it has been remodeled. When one man owned all the stores he may have cut some doorways through upstairs. I don't know just how it got that way.

[Footnote continued on page 5]

Although the issue was never clearly decided as to what building or buildings actually contained apartments 7 and 8,[3] the motions judge ruled that appellants did have standing to complain of the warrant's language and granted appellants' motion to suppress on the theory that the warrant was too broad. The court apparently based its ruling on the ground that, since there was no probable cause to search *apartment No. 8* but the warrant could be interpreted as authorizing such a search, the warrant was too broad and any evidence seized *in apartment No. 7* must be suppressed (Tr. 22-32).

The Government appealed from the court's ruling to the District of Columbia Court of Appeals, contending there that the search warrant was sufficiently particular as to the area to be searched and that appellants did not have standing to complain that the warrant was unduly broad. The District of Columbia Court of Appeals reversed the decision of the Court of General Sessions, holding that the search warrant was sufficiently particular in its description of the place to be searched because it incorporated by reference the attached affidavit which contained the street number and apartment number of the premises and the names of the occupants. *United States* v. *Moore*, 263 A.2d 652 (D.C. Ct. App. 1970). From that decision appellants have appealed to this Court.

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[2] [Continued]

But the point is that from the address on the door, 3417 services two apartments—one on the left and one on the right. Maybe the one on the left is actually over 3419, maybe it isn't. I don't know what the numbers are. I don't even know positively that there is a 3419. I don't think the officer is even positive of that. (Tr. 22-25.)

[3] See footnote 2, *supra*.

ARGUMENT

I. The search warrant was sufficiently particular as to the area to be searched.

Under the Fourth Amendment to the Constitution, it is essential to the validity of a search warrant that it describe with particularity the place to be searched.[4] A description of a place to be searched is generally sufficient if the "officer with the warrant can, with reasonable effort, ascertain and identify the place intended." *Steele* v. *United States*, 267 U.S. 498, 503 (1925); *Irwin* v. *United States*, 67 App. D.C. 41, 89 F.2d 678 (1937); *United States* v. *Poppitt*, 227 F. Supp. 73 (D. Del. 1964); *Frey* v. *State*, 3 Md. App. 38, 237 A.2d 774 (1968). In the case of a multiple-occupancy dwelling, however, a warrant issued on probable cause for searching one apartment must describe more than just the entire building, or else it will fail for lack of description. *United States* v. *Hinton*, 219 F.2d 324 (7th Cir. 1955); *United States* v. *Barkoukas*, 38 F.2d 837 (M.D. Pa. 1930). This essential requirement that the police officers seeking to execute the warrant be able to determine from the warrant the specific place to search in the multiple-occupancy dwelling may be satisfied by giving the address of the building and naming the person whose apartment is to be searched. *Kenney* v. *United States*, 81 U.S. App. D.C. 259, 157 F.2d 442 (1946); *Shore* v. *United States*, 60 App. D.C. 137, 49 F.2d 519, *cert. denied*, 283 U.S. 865 (1931); *United States* v. *Poppitt*, *supra*. Appellee submits that these requirements were met in the case at bar.

In *Kenney*, *supra*, the warrant directed the officers to search the "premises occupied by William C. Kenney and

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[4] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

over which he has possession and control . . . said premises being described as 2211 'N' Street, N.W., Washington, D.C." However, the building at that address contained two apartments, one on the second floor and one on the third. The defendant argued that there was not sufficient particularity to render the warrant valid, but this Court upheld the warrant because it contained the address of the building and named the person whose apartment was to be searched. The Court also looked to the fact that the defendant's apartment was the only area searched in resolving the issue of particularity. The circumstances of *Shore*, *supra*, were almost identical to those in *Kenney* with a similar result.

Appellee submits that the warrant in the instant case is sufficiently particular because any officer would be able to ascertain and identify the precise area to be searched. The District of Columbia Court of Appeals noted that the only apartment searched was the one within the control and possession of appellants. *United States* v. *Moore*, *supra*, 263 A.2d at 653. It further noted that the affidavit was attached to the warrant and contained the street number, the apartment number and appellants' names. *Id.* Therefore, relying on *Frey* v. *State*, *supra*, and *Ellison* v. *State*, 186 Tenn. 581, 212 S.W.2d 387 (1948), the court held that "[i]f the affidavit required for the issuance of the warrant is attached to the warrant and incorporated therein by reference, it can be used by the officer to identify the place intended." *Id.*[5] This decision

[5] Appellants assert that the District of Columbia Court of Appeals' decision was erroneous because "[a]ll that this record shows is a 'form' warrant parenthetically stating 'affidavit attached herewith' (App. 27). There was no evidence that it was in fact attached to the warrant, much less incorporated by reference" (Appellants' brief, p. 8). Appellee submits, however, that in the absence of affirmative proof from appellants that the affidavit was not attached to the warrant, the presumption of regularity in official documents permits the conclusion that the affidavit was attached to the warrant as described. *E.g.*, 9 WIGMORE, EVIDENCE § 2534 (3d ed. 1940). *Cf. Gass* v. *United States*, 135 U.S. App. D.C. 11, 416 F.2d 767 (1969).

is eminently correct because any possible deficiency in the warrant in this case was compensated by the supporting affidavit, which we submit is legally part of the warrant, and the affidavit and the warrant together provided probable cause for the search. Because of the specificity of the affidavit and warrant, *i.e.*, names, address and apartment number, it is difficult to imagine any description which might have better informed any executing officers of the precise place to be searched.

Despite the sensibility of the District of Columbia Court of Appeals' decision, appellants nevertheless contend that this Court should reverse that ruling because it is contrary to this Court's decision in *United States* v. *Kaye*, D.C. Cir. No. 22,543, decided June 30, 1970. Appellee submits, however, that the two cases are readily distinguishable; *Kaye*, in fact, is the exact converse of the case at bar.

The language of the search warrant in *Kaye* authorized a search of "the premises known as 3618 14th Street, N.W.," which the evidence showed was a first-floor retail business store with a basement. The second floor was the defendant's apartment, which was separate and distinct from the first floor and basement with no door or direct passage between them. The address for the second-floor apartment was 3618½ 14th Street, N.W. The police searched the defendant's store and thereafter forced the door to the second-floor apartment. There they seized a stolen movie projector which was the subject of the defendant's motion to suppress. The affidavit in support of the warrant described the premises as a "two-story brick building." The Government argued that the scope of the search warrant was broadened by the description of the premises contained in the affidavit and, therefore, that the search of the second-floor apartment was valid. This Court rejected that argument and held:

> When a store and an apartment are thus arranged a warrant authorizing search of the store—as this warrant did—can hardly be stretched to justify an intrusion into the apartment, regardless of language

> in the supporting affidavit which might be construed more broadly. [Citations omitted.] It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched. Slip op. at 5-6.

Our argument in the case at bar is not the same as the argument made in *Kaye*. We do not contend here that the language of the supporting affidavit expands the scope of the authorized area of the search, which arguably might subvert the purpose of providing prior judicial review of search warrants. On the contrary, we urge that this supporting affidavit acts, in effect, to *restrict* the scope of the authorized search by identifying for the executing officers the precise area to be searched. Consequently, we are not asserting, as appellants suggest, that the supporting affidavit alone defines or determines the area of the authorized search in the sense that it may broaden it, because that is what this Court condemned in *Kaye*. If the police had entered and searched apartment No. 8, we may assume for the purpose of this appeal that such a search would have been invalid and subject to constitutional challenge.[6] But even if that were the case, the search of apartment No. 7 would not be affected in any way by the posited invalidity of the search of No. 8. *Cf. United States* v. *Scott*, 269 A.2d 444 (D.C. Ct. App. 1970). The District of Columbia Court of Appeals expressly noted that the police searched only appellants' apartment, No. 7, and not the other one on the second floor, No. 8. This fact strongly undercuts appellants' various policy contentions that a failure of this Court to reverse would invariably result in unjustified and unlawful intrusions upon the privacy of innocent persons due to the executing officers' unawareness of any limiting language in the supporting affidavit. This case should be decided only on its facts; the lawfulness of the police action should be determined by considering "what was and

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[6] Such a challenge, of course, could only be made by the occupants of apartment No. 8. See argument II, *infra*.

not what might have been." *United States* v. *Scott*, *supra*, 269 A.2d at 445. Consequently, the fact that the police did not search any area of the building or seize any items which they had no probable cause to search or seize should sufficiently distinguish this case from *Kaye*.

The District of Columbia Court of Appeals has simply ruled that where the supporting affidavit is attached to the warrant and is incorporated therein by reference, it may be referred to by the officer to identify the area to be searched. This holding is most certainly reasonable and does not conflict with *Kaye* because no greater area of authorized search is permitted by reference to the affidavit. Thus limited, the warrant and search were abundantly supported by probable cause, and therefore the District of Columbia Court of Appeals' decision should remain undisturbed.[7]

II. Appellants do not have standing to complain that the search warrant was unduly broad.

The trial court ruled that appellants had the necessary standing to assert the theory that the warrant was invalid because it authorized the search of apartment No. 8 as well as their own. The court so ruled in spite of the

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[7] Appellants' reliance on *United States* v. *Hinton*, *supra*, is misplaced. There the affidavit for the search warrant stated that four persons, referred to by aliases, had sold heroin the previous day at a certain apartment building. The affidavit did not identify the particular apartment or apartments in which the sales were made, nor did it recite that the sales were made in apartments occupied by any of the alleged sellers. The information in the affidavit did not connect any of the aliases to any of the apartments except to say that narcotics were sold somewhere on the premises. A warrant was issued authorizing a search of the entire building—a basement and three upper floors which each constituted separate residences. The police searched the basement and the three upper floors. The court ruled that there was there was no probable cause for the *issuance* of the search warrant on the meager facts of the affidavit. In the case at bar there is no suggestion that the affidavit failed to provide probable cause for the issuance of a warrant. Here the search was confined to the area for which there was abundant probable cause, and the information contained in the supporting affidavit unequivocally connects appellants to the area searched.

fact that apartment No. 8 was never searched by the officers executing the warrant. The trial court, in effect, permitted appellants vicariously to assert the Fourth Amendment rights of the occupants of apartment No. 8 against searches not supported by probable cause. In the District of Columbia Court of Appeals we argued that appellants were without standing to complain that this warrant was unduly broad, since its asserted overbreadth did not infringe in any way upon their rights under the Fourth Amendment. The court's decision did not require a ruling on this question. Nevertheless, we reiterate here our contention that appellants have no such standing.

Fourth Amendment rights are personal rights which cannot be vicariously asserted. *Alderman* v. *United States*, 394 U.S. 165 (1969); *Bryson* v. *United States*, 136 U.S. App. D.C. 113, 419 F.2d 695 (1969). Consequently, the Fourth Amendment rights of the occupants of apartment No. 8 cannot be asserted by appellants, who live in apartment No. 7. The search of appellants' apartment was founded on probable cause and was clearly within the scope of the warrant and supporting affidavit. Their apartment was fully described in the affidavit, and this apartment was the only one searched. Appellants have no standing to complain that the warrant was too broad, where the only persons who would be affected by such overbreadth are the occupants of apartment No. 8 and where apartment No. 7, belonging to appellants, was the only one searched. *Kenney* v. *United States*, *supra*; *Shore* v. *United States*, *supra*. *See also United States* v. *Poppitt*, *supra*; *United States* v. *Yablonsky*, 8 F.2d 318 (S.D.N.Y. 1925).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District of Columbia Court of Appeals should be affirmed.

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